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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 **JAHIR ALBERTO ROJAS,**

16 Plaintiff,

17 v.

18 **R. LOZA, Correctional Officer, R. SINGH,**
19 **Correctional Officer, D. SANDOVAL, Correctional**
Officer,

20 Defendants.
21

C 07-4662 MMC (PR)

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS AND MOTION FOR
QUALIFIED IMMUNITY**

22 TO PLAINTIFF JAHIR ALBERTO ROJAS, PRO SE:

23 PLEASE TAKE NOTICE that defendants Loza, Singh, and Sandoval (Defendants) move
24 the Court to dismiss this action for Jahir Alberto Rojas' (Plaintiff) failure to exhaust his
25 administrative remedies before filing suit as required by the Prison Litigation Reform Act
26 (PLRA), 42 U.S.C. § 1997e(a). Defendants also move the Court for qualified immunity for
27 Plaintiff's damages claim.

28 PLEASE TAKE FURTHER NOTICE that the Court may look beyond the pleadings and

Defs.' Not. of Mot. and Mot. to Dismiss and Mot. for Qualified Immunity

Rojas v. Loza, et al.
C 07-4662 MMC (PR)

1 decide disputed issues of fact when ruling on Defendants' non-enumerated Rule 12(b) motion.
 2 *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). Plaintiff may provide evidence to the
 3 Court to dispute that which is presented by Defendants. *Id.* at n.14.

4 This motion is based on this Notice, the following Memorandum of Points and
 5 Authorities, the declarations and exhibits filed in support of this motion, the proposed order, and
 6 the pleadings and records on file with the Court in this action.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **ISSUES PRESENTED**

9 1.) The PRLA requires an inmate to properly exhaust administrative remedies before
 10 filing civil-rights suits concerning prison conditions. Plaintiff's appeal was not exhausted
 11 because he did not complete the final level of review. Does the PRLA's exhaustion provision
 12 require that Plaintiff's claims be dismissed?

13 2.) Qualified Immunity protects government officials from liability for damages when
 14 their conduct does not violate clearly established rights of which a reasonable prison official
 15 would have known. Plaintiff refused to obey orders during a prison yard disturbance and was
 16 found guilty of a prison rules violation. Would reasonable officials in Defendants' positions
 17 have believed such conduct violated Plaintiff's rights?

18 **SUMMARY OF ARGUMENT**

19 The Plaintiff cannot satisfy the PLRA's administrative exhaustion requirement because
 20 the administrative appeal received no final Director's level review, and therefore did not properly
 21 exhaust all available administrative remedies.

22 Defendants reasonably believed the amount of force used was lawful and necessary to
 23 restore order at Salinas Valley State Prison so they are entitled to summary judgment.

24 **STATEMENT OF THE CASE**

25 Plaintiff Jahir Alberto Rojas, CDCR number P-58734, is a state prisoner currently
 26 incarcerated at California State Prison, Corcoran. On September 10, 2008, Plaintiff filed this
 27 action under 42 U.S.C. § 1983. On April 28, 2008, this Court screened Plaintiff's complaint
 28 under the PLRA, and recognized an Eighth Amendment claim for excessive force against

1 Defendants Loza, Singh, and Sandoval. (Order of Initial Review, Docket No. 8, dated April 28,
2 2008, at 2:13-15.) The Court's screening order required a dispositive motion to be filed by July
3 27, 2008. (*Id.* at 3:6-8.)

4 STATEMENT OF FACTS

- 5 1. On February 12, 2007, Defendants responded to a massive standoff at Salinas Valley
6 State Prison between approximately one hundred and forty African-American and Southern
7 Hispanic inmates which resulted in a standoff, where all inmates refused to leave the yard. (*See*
8 *Compl.*, Docket No. 1, Ex. G, Rules Violation Report.)
- 9 2. During the disturbance, correctional officer Morring ordered Plaintiff to crawl backward
10 toward a skirmish line formed by other correctional officers. (*See Id.*, Ex. A, Crime Incident
11 Report.)
- 12 3. Plaintiff refused the order but instead shouted "fuck that shit" and began advancing
13 toward staff with clenched fists. (*See Id.*)
- 14 4. Defendant Loza then ordered the Plaintiff multiple times to lie face down on the ground.
15 (*See Id.*)
- 16 5. Defendant Loza then placed Plaintiff in flexcuffs and began escorted him to the skirmish
17 line. (*See Id.*)
- 18 6. During the escort, Plaintiff violently twisted his upper torso and swung his elbows from
19 left to right. (*See Id.*)
- 20 7. Defendant Loza gave direct orders to stop resisting, which the Plaintiff refused, and then
21 swung his left elbow into Defendant Loza's right ribcage. (*See Id.*)
- 22 8. Defendant Loza, with the assistance of Defendant Singh, forced Plaintiff to the ground,
23 face down. (*See Id.*)
- 24 9. As Defendant Loza tried to gain control of the Plaintiff, he began shouting "Get them."
25 (*See Id.*)
- 26 10. Immediately, the remaining unsecured Southern Hispanic inmates stood up and began
27 advancing toward Defendant Loza, as Plaintiff continued to resist by swinging his elbows and
28 kicking his feet. (*See Id.*)

1 11. Defendant Loza ordered the Plaintiff to stop resisting, which he refused, forcing
2 Defendant Loza to pepper spray Plaintiff's upper torso. (*See Id.*)

3 12. At this point, Defendant Loza observed multiple Southern Hispanics advancing toward
4 him, so he deployed a blast dispersion grenade to subdue them. (*See Id.*)

5 13. Defendant Sandoval then aided Defendant Loza in resuming Plaintiff's escort to a
6 temporary holding cell in the Health Services Annex. (*See Id.*, Ex. G, Rules Violation Report.)

7 14. While Defendant Loza and Defendant Sandoval attempted to place Loza in a temporary
8 holding cell, Plaintiff began vigorously shaking his body in a left and right motion, and broke
9 free of their hold. (*See Id.*)

10 15. Plaintiff then grabbed Defendant Loza's right forearm, while his hands were restrained to
11 the rear by his flex cuffs. (*See Id.*)

12 16. While maintaining his hold on Defendant Loza, Plaintiff pulled his body forward, pulling
13 Defendant Loza on top of him and to the ground. (*See Id.*)

14 17. Finally, Defendants Loza and Sandoval regained control of Plaintiff and placed him in a
15 temporary holding cell. (*See Id.*)

16 18. Due to his disruptive behavior, Defendant Loza recommended Plaintiff's transfer to
17 another Level four institution. (*See Id.*)

18 19. Plaintiff was later found guilty of the Rules Violation for battery on a peace officer.
19 (*See Medina Decl.* ¶ 6, Ex. C.)

20 20. Plaintiff alleges that during the initial disturbance and escort, Defendant Loza thrust his
21 knee into Plaintiff's back, placed his flexcuffs on too tight, jerked him during the escort, swung
22 him to the ground, and deployed pepper spray on him. (*See Compl.*, Docket No. 1, at 4(I) ¶ 4, 5,
23 6.)

24 21. Plaintiff's only allegation against Defendant Singh is that he jerked him during his escort
25 toward the skirmish line formed by the officers during the yard fight disturbance. (*See Id.* at 4(I)
26 ¶ 5.)

27 22. Plaintiff also alleges that after being escorted to the Health Annex, Defendant Loza and
28 Sandavol rammed his head into a wall, hit him with their fists in the upper and lower torso, and

1 kicked him in the head, face, and torso. (*See Id.* at 4(I) ¶ 8, 9, 10.)

2 23. The medical records submitted by Plaintiff show bruising to the head, swelling to the left
3 eye, a small abrasion and bruise to the left shoulder, and pepper spray exposure to the front torso
4 and back shoulders. (*See id.* at Ex. D. Medical Report of Injury or Unusual Occurrence.)

5 24. The medical records do not show any injuries to the wrists, upper torso, or lower torso.
6 (*See Id.*)

7 25. On March 28, 2007, the Salinas Valley Inmate Appeals Office received Plaintiff's
8 administrative appeal, bearing institutional log number SVSP-D-07-01389 (Appeal), regarding
9 the February 12, 2007 incident. (Medina Decl. ¶ 5, Ex B.)

10 26. The Appeal automatically bypassed the informal level of appeal due to the excessive
11 force allegations. (*Id.*)

12 27. The Appeal, however, was screened out for untimeliness because it was filed forty-four
13 days after the alleged incident and well beyond the fifteen-working-day requirement under the
14 Code. (Cal. Code Regs. tit. 15, § 3084.6(c); Medina Decl. ¶ 5, Ex. B.)

15 28. Plaintiff then submitted the Appeal to the third formal review level. (Grannis Decl. ¶ 9,
16 Ex. A.)

17 29. The Director's level screened out the Appeal for failure to submit to the second formal
18 level of review. (*Id.*)

19 ARGUMENT

20 I. THE PRISON LITIGATION REFORM ACT'S EXHAUSTION REQUIREMENT 21 REQUIRES DISMISSAL OF UNEXHAUSTED CLAIMS

22 A. Legal Standard.

23 When an inmate-plaintiff fails to exhaust, a defendant may file a non-enumerated Rule
24 12(b) motion to dismiss. *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). In ruling on
25 such a motion, a court may look beyond the pleading to decide disputed issues of fact regarding
26 exhaustion. *Id.* The proper disposition for failure to exhaust is dismissal without prejudice. *Id.*
27 at 1120.

28 The PLRA requires that inmates exhaust their available administrative remedies before

1 filing civil-rights actions in federal courts. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516,
 2 524 (2002); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). In addition, the
 3 Supreme Court held that exhaustion of available remedies requires that a prisoner "properly
 4 exhaust," which means that "prisoners must complete the administrative review process in
 5 accordance with the applicable procedural rules, . . . rules that are defined not by the PLRA, but
 6 by the prison grievance process itself." *Jones v. Bock*, 549 U.S. 199, 211 (internal citations and
 7 quotation marks omitted) (quoting *Woodford v. Ngo*, 126 S. Ct. 2378, 2384 (2006)). Therefore,
 8 "[c]ompliance with prison grievance procedures . . . is all that is required by the PLRA to
 9 'properly exhaust.'" *Id.* The Supreme Court also affirmed that a prisoner cannot satisfy the
 10 PLRA's exhaustion requirement "by filing an untimely or otherwise procedurally defective
 11 administrative grievance or appeal." *Id.* at 2382. A prisoner must properly proceed through each
 12 stage of the administrative process, to obtain a final Director's level of review in order to bring a
 13 federal lawsuit. *Id.* at 2387.

14 **B. California's Inmate Appeals Process.**

15 The grievance process in the State of California allows inmates in California prisons to
 16 appeal "any departmental decision, action, condition, or policy which they can demonstrate as
 17 having an adverse effect upon their welfare." Cal. Code Regs. tit. 15, § 3084.1. To exhaust this
 18 process, before proceeding to federal court, an inmate must proceed through four levels of
 19 appeal: (1) informal level; (2) first formal level; (3) second formal level; and (4) third formal
 20 level, also known as the Director's level review. *Id.* § 3084.5. A decision at the third formal
 21 level, or Director's level of review, is final and constitutes exhaustion of available administrative
 22 remedies. *Id.* §§ 3084.1(a), 3084.5(e)(2).

23 To initiate the inmate appeal process, inmates must use a form CDC 602 (Form) to
 24 describe the problem complained of and the action requested. (Cal. Code Regs. tit. 15, § 3084.2;
 25 Grannis Decl. ¶ 3.) The inmate must submit the Form to the Appeals Coordinator within fifteen
 26 working days of the action taken. *Id.* § 3084.6(c). An inmate's appeal may be rejected where the
 27 time limits for submitting the appeal are exceeded and the appellant had the opportunity to file
 28 within the prescribed time constraints. *Id.* § 3084.3(c)(6). The informal level is bypassed for

1 excessive force allegations. *Id.* §§ 3084.5(a)(3)(b), 3084.5(b)(a)(4).

2 **C. This Action Must be Dismissed Because Plaintiff Filed an Untimely Administrative**
 3 **Appeal.**

4 On March 28, 2007, the Salinas Valley State Prison Inmate Appeals Office received
 5 Plaintiff's Appeal regarding the alleged February 12, 2007 incident. (Medina Decl. ¶ 5, Ex B.)
 6 The Appeal automatically bypassed the informal level of appeal due to the excessive force
 7 allegations. (*Id.*) The Appeal, however, was screened out for untimeliness because it was filed
 8 forty-four days after the alleged incident, well after the fifteen working days required under the
 9 Code had expired. (Cal. Code Regs. tit. 15, § 3084.6 (c); Medina Decl. ¶ 5, Ex. B.)

10 The Appeal was returned to Plaintiff and submitted to the third formal review level.
 11 (Grannis Decl., ¶ 9, Ex. A.) The Director's level screened out the Appeal for failure to submit to
 12 the second formal review level. (*Id.*)

13 Plaintiff did not comply with the critical inmate appeals timing requirements. Since
 14 Plaintiff failed to file a timely Appeal in this matter, he did not properly exhaust his
 15 administrative remedies. Accordingly, the case must be dismissed under *Woodford*, 126 S.Ct. at
 16 2384. *Woodford* involved a California inmate who filed an administrative grievance six months
 17 after the event. *Woodford v. Ngo*, 126 S. Ct. 2378 (2006). The grievance was rejected for the
 18 same reason as in this case. It was untimely because it was not filed within fifteen working days
 19 of the event under California Code of Regulations, tit. 15 § 3084.6(c). The Supreme Court held
 20 that the PLRA required an inmate to comply with the administrative grievance rules: "[p]roper
 21 exhaustion of administrative remedies demands compliance with an agency's deadlines and other
 22 critical procedural rules because no adjudicative system can function effectively without
 23 imposing some orderly structure on the course of its proceedings." *Id.* at 2386.

24 Since *Woodford* holds that inmates who fail to timely comply with the prison's
 25 administrative grievance procedures are barred from suing on their claims, Plaintiff's untimely
 26 appeal is barred and the complaint should be dismissed without prejudice.

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1 **II. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.**

2 **A. Qualified Immunity Standard.**

3 The defense of qualified immunity applies to "government officials performing
4 discretionary functions," who are "generally are shielded from liability for civil damages insofar
5 as their conduct does not violate clearly established statutory or constitutional rights of which a
6 reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citation
7 omitted). The rule of qualified immunity "provides ample protection to all but the plainly
8 incompetent or those who knowingly violate the law." *Burns v. Reed*, 500 U.S. 478, 494-495
9 (1991) (citation omitted).

10 In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a sequence of
11 questions to be considered in determining whether qualified immunity is applicable. First, a
12 Court must consider this threshold question: "Taken in the light most favorable to the party
13 asserting the injury, do the facts alleged show the officer's conduct violated a constitutional
14 right?" *Id.* at 201. If no constitutional right was violated under the alleged facts, the inquiry ends
15 and defendants prevail. *Id.* If, however, "a violation could be made out on a favorable view of
16 the parties' submissions," then the next sequential step is to ask whether the right was clearly
17 established. *Id.*

18 **B. Defendants Are Entitled to Qualified Immunity Because Plaintiff Failed to Show**
19 **Defendants' Actions Violated a Constitutional Right.**

20 As to the first prong of *Saucier*, Defendants did not violate Plaintiff's Eighth Amendment
21 rights. Plaintiff's sole basis for relief against Defendants is excessive force against him during a
22 yard standoff. (Compl., Docket No. 1, dated September 10, 2007, at 3 - 4III.)

23 Whenever a prison official is accused of using excessive force in violation of the Eighth
24 Amendment, the core judicial inquiry is whether the force was applied in a good-faith effort to
25 maintain or restore discipline, or maliciously and sadistically for the very purpose of causing
26 harm. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Whitley v. Albers*, 475 U.S. 312, 320-21
27 (1986). To make that ultimate determination, the court may properly consider such factors as (1)
28 the extent of injury suffered by the Plaintiff; (2) the need for the application of force; (3) the

1 relationship between that need and the amount of force used; (4) the threat reasonably perceived
 2 by the responsible officials; and (5) whether officials made efforts to temper the severity of a
 3 forceful response. *Hudson*, 503 U.S. at 12; *Whitley*, 475 U.S. at 321.

4 Prison officials must balance competing interests such as the need to restore order, the
 5 very real threat the disturbance poses to inmates, and the possible harm to inmates against whom
 6 force is used. *Whitley*, 475 U.S. at 320. Such decisions are "necessarily made in haste, under
 7 pressure, and frequently without the luxury of a second chance." *Id.*

8 "Prison administrators . . . should be accorded wide-ranging deference in their adoption
 9 and execution of policies and practices that in their judgment are needed to preserve internal
 10 order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547
 11 (1979). "That deference extends to a prison security measure taken in response to an actual
 12 confrontation with riotous inmates . . . [C]ourts must determine whether the evidence goes
 13 beyond a mere dispute over the reasonableness of a particular use of force or the existence of
 14 arguably superior alternatives." *Whitley*, 475 U.S. at 322. While officials are not insulated from
 15 actions taken in bad faith or for no legitimate purpose, courts should not second guess the
 16 judgment of the officials who have made a considered choice. *Id.*

17 On February 12, 2007, Defendants responded to a massive disturbance at Salinas Valley
 18 State Prison between approximately one hundred and forty African-American and Southern
 19 Hispanic inmates which resulted in a standoff, where all inmates refused to leave the yard. (*See*
 20 *Compl.*, Docket No. 1, dated September 10, 2007, Ex. G, Rules Violation Report.) During the
 21 disturbance, a skirmish line was formed and correctional officer Moring ordered Plaintiff to
 22 crawl backward toward it. (*See Id.*, Ex. A, Crime Incident Report.) Plaintiff refused the order but
 23 instead shouted "fuck that shit" and began advancing toward staff with clenched fists. *Id.*
 24 Defendant Loza then ordered Plaintiff multiple times to lie face down. *Id.* Plaintiff eventually
 25 complied and Defendant Loza placed him in flexcuffs and escorted him to the skirmish line. *Id.*

26 During the escort, Plaintiff violently twisted his upper torso and swung his elbows from
 27 left to right. (*See Id.*, Ex. A, Crime Incident Report.) Defendant Loza gave direct orders to stop
 28 resisting the escort, which Plaintiff refused, and then swung his left elbow into Defendant Loza's

1 right ribcage. *Id.* Defendant Loza, with the assistance of Defendant Singh, forced Plaintiff to the
 2 ground in the prone position. *Id.* Plaintiff landed on his upper torso area and his face. *Id.* The
 3 initial use of force against Plaintiff by Defendants Loza and Defendant Singh was necessary to
 4 maintain and restore order and security during a massive disturbance in the yard.

5 After Plaintiff was forced to the ground, Plaintiff shouted "Get them." *Id.* Immediately,
 6 the remaining unsecured Southern Hispanics stood up and began advancing toward Defendant
 7 Loza, as Plaintiff continued to swing his elbows and kick his feet. *Id.* Defendant Loza then
 8 ordered the Plaintiff to stop resisting, which he refused, forcing Defendant Loza to pepper spray
 9 Plaintiff's upper torso to gain compliance. *Id.* At this point, Defendant Loza observed multiple
 10 Southern Hispanics advancing toward him. *Id.* This involvement by other inmates heightened
 11 the risk and potential danger of the situation causing Defendant Loza to deploy a blast dispersion
 12 grenade. *Id.* Aware of this danger and concerned for the safety of himself, other officers, and the
 13 security of the institution, Defendant Loza dispensed the pepper spray and other chemical agents
 14 in order to persuade Plaintiff to comply with his orders and to maintain order.

15 Afterward, Defendant Sandoval aided Defendant Loza in Plaintiff's escort to a temporary
 16 holding cell in the Health Services Annex. (*See* Compl., Docket No. 1, dated September 10,
 17 2007, Ex. G, Rules Violation Report.) While Defendant Loza and Defendant Sandoval
 18 attempted to place Loza in a temporary holding cell, Plaintiff began vigorously shaking his body
 19 in a left and right motion, and broke free of their hold. *Id.* Plaintiff then grabbed Defendant
 20 Loza's right forearm, while his hands were restrained to the rear by his flex cuffs. *Id.* While
 21 maintaining his hold on Defendant Loza, Plaintiff pulled his body forward, pulling Defendant
 22 Loza on top of Plaintiff and to the ground. *Id.* Plaintiff posed an obvious and immediate threat
 23 to the Defendant officers and the security of the building compelling the Defendants to physically
 24 regain control of the Plaintiff. Ultimately, Defendants Loza and Sandoval successfully placed
 25 Plaintiff in a temporary holding cell and later recommended his transfer to another Level four
 26 institution. *Id.* Plaintiff was later found guilty of the Rules Violation for battery on a peace
 27 officer. (*See* Medina Decl. ¶ 6, Ex. C.)

28 While Plaintiff claims that the Defendants placed his handcuffs on too tight, kned him in

1 the back, slammed him to the ground, pepper sprayed him, rammed his head, and hit and kicked
 2 him in the head and torso, the medical records corroborate Defendants' statements of the
 3 incident. The medical records show bruising to the head, small swelling to the left eye, a small
 4 abrasion and bruise to the left shoulder, and pepper spray exposure to the front torso and back
 5 shoulders, which are consistent with pepper spraying and forcing an inmate to the ground, face
 6 down. (*See* Compl., Docket No. 1, dated September 10, 2007, Ex. D, Medical Report of Injury
 7 or Unusual Occurrence.) The medical records do not show any injuries to the wrists, upper torso,
 8 or lower torso as alleged in the Plaintiff's Complaint. (*See Id.*)

9 Throughout the struggle to maintain control over the assaultive Plaintiff, the officers
 10 used the minimal amount of force required to control Plaintiff. Further, Defendants
 11 gave Plaintiff numerous orders to stop resisting. Defendants Loza, Sandoval, and Singh merely
 12 defended themselves and utilized appropriate force to maintain control and order during a
 13 dangerous assault, which is supported by the medical records, Rules Violation Report, and Crime
 14 Incident Report that Plaintiff submitted to this Court. Further, Plaintiff's injuries were minimal.

15 As a result, these officers did not act maliciously or sadistically towards Plaintiff. They
 16 simply did what they had to do to protect themselves and to maintain order and security in the
 17 prison. As a result, there was no constitutional violation by Defendants and they should be
 18 afforded qualified immunity.

19 **B. Defendants are Entitled to Qualified Immunity Because It Would Not Have Been**
 20 **Clear to Reasonable Officials that the Conduct at Issue was Unlawful.**

21 Assuming, *arguendo*, that a constitutional violation could be found, then the next step
 22 under *Saucier* is to ask whether the right violated was a clearly established right. This is an
 23 inquiry that "must be undertaken in light of the specific context of the case, not as a broad
 24 general proposition." *Saucier*, 533 U.S. 194. More specifically, the "relevant, dispositive inquiry
 25 in determining whether a right is clearly established is whether it would be clear to a reasonable
 26 officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

27 Here it would not have been clear to a reasonable officer that such conduct as alleged was
 28 unlawful in the context of subduing the Plaintiff during a standoff.

1 There is no clearly established right for an inmate to be free from restraint as long as he
 2 poses a risk to the safety and security of the institution. On the contrary, as long as an inmate
 3 poses a security risk, prison officials are "authorized and indeed required to take appropriate
 4 measures to maintain prison order." *LeMaire v. Maass*, 12 F.3d 1444, 1458 (9th Cir. 1993). As
 5 noted by the Ninth Circuit,

6 [The Plaintiff Inmate] is the master of his own fate. As long as he engages in
 7 violent and disruptive behavior, prison officials are authorized and indeed
 8 required to take appropriate measures to maintain prison order and discipline and
 9 protect staff and other prisoners from such violent inmates.

10 *Id.*

11 In this case, Plaintiff's refused several direct orders, advanced toward staff with clenched
 12 fists, incited other inmates, hit Defendant Loza in the ribs, and later grabbed Defendant Loza and
 13 forced him to the ground. (See Compl., Docket No. 1, dated September 10, 2007, Ex. G.)
 14 Although Plaintiff alleges that Defendants placed his handcuffs on too tightly, pushed him to the
 15 ground, and assaulted him, under these circumstances of an ongoing inmate standoff, a
 16 reasonable prison official would not have believed that using an amount of force reasonably
 17 necessary to restore order and protect correctional officers was unlawful. Even if Defendants'
 18 actions were found to have violated a constitutional right, they should be afforded qualified
 19 immunity since they acted as reasonable officers under the circumstances of a stressful massive
 20 inmate standoff. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

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1 **CONCLUSION**

2 Defendants respectfully request that the Court dismiss this action since Plaintiff failed to
3 exhaust his available administrative remedies through the requisite third level. Additionally,
4 Defendants are entitled to qualified immunity.

5 Dated: July 25, 2008

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7 Respectfully submitted,

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